

MOTION FILED
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No. 83-245

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION
and OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND,

Appellants,

v.

R.A. GRAY & COMPANY,

Appellee.

On Appeal From the United States Court of Appeals
For the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF OF G & R ROOFING COMPANY AS
*AMICUS CURIAE***

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

G & R Roofing Company ("G & R") respectfully moves the Court for leave to file the attached brief *amicus curiae*.¹ In support of this motion, G & R states:

¹ Pursuant to Sup.Ct.R. 36.1, counsel for G & R requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief, necessitating this motion. Counsel for appellant, Pension Benefit Guaranty Corporation ("PBGC"), and for appellee have consented to the filing of the brief.

G & R Roofing Company is a California corporation and a contractor engaged in the building and construction industry. G & R is an appellee and cross-appellant in the consolidated appeal resulting in the opinion of the court of appeals which is sought to be reviewed here. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th Cir. 1983). In that decision, the court of appeals struck down as unconstitutional the imposition of withdrawal liability on G & R, as well as the other employer parties, Shelter Framing Corporation and R.A. Gray & Company. The withdrawal liability was assessed under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. § 1381 *et seq.* (Supp. V 1981), for withdrawals from multiemployer pension plans before the enactment date of the statute on September 26, 1980, but after its retroactive effective date of April 29, 1980.

On July 1, 1980, G & R terminated its collective bargaining relationship with the Carpenters' union. On September 2, 1981, the Carpenters Pension Trust for Southern California ("CPT") assessed a withdrawal liability against G & R in the amount of \$687,387. The lump sum withdrawal liability totaled 40% of the company's net worth. If G & R paid the withdrawal liability on an installment basis, the annual liability would represent 94% of G & R's net income during the 1981 year. *Shelter Framing*, 705 F.2d at 1506 (Appellant's App. A 7a-8a).²

The appeal seeks to reverse the court of appeals' decision holding the retroactive imposition of withdrawal liability to be unconstitutional. G & R has an essential and unique interest in the appeal. G & R's request for leave to file the attached brief *amicus curiae* is made in furtherance of that interest.

G & R seeks by the brief *amicus curiae* to suggest to the Court that it defer consideration of the jurisdictional statement in this case of nationwide importance until the court of appeals has disposed of the petition for rehearing filed by CPT in the court of appeals and has considered a subsequently filed petition for certiorari.³ This suggestion is made

² "Appellant's App." refers to the appendix to the appellant's jurisdictional statement.

³ Before the notice of appeal in this case was filed, CPT filed a petition for rehearing and suggestion for rehearing *en banc* from the court of appeals' decision. That petition is still pending. If the petition is denied, counsel for G & R has been advised that CPT will

in order that the Court will have the opportunity to consider the entire decision of the court of appeals, including the record in all cases consolidated for the decision which appellant now seeks to have the Court review prematurely on appeal. Appellant PBGC has not advised the Court of the premature procedural posture of the appeal in its jurisdictional statement. Because G & R believes that the appellee will not fully present the view of G & R that the Court should defer consideration of the jurisdictional statement, it is important that the position taken in the attached brief *amicus curiae* be considered by the Court.

Accordingly, G & R respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Counsel for *amicus curiae*

(Footnote 3 continued from page 2)

petition for certiorari in this Court. If the petition for rehearing is granted, and the panel decision is reversed (which would undoubtedly moot PBGC's appeal), G & R will file a petition for certiorari.

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No. 83-245

IN THE
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Appellee.

On Appeal From the United States Court of Appeals
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BRIEF OF *AMICUS CURIAE* G & R ROOFING COMPANY

INTEREST OF THE *AMICUS CURIAE*

G & R Roofing Company ("G & R") is an appellee and cross-appellant in the decision of the court of appeals which is sought to be reviewed on appeal. A claim for withdrawal liability has been assessed against G & R in the amount of \$687,387.¹ As will be more fully developed *infra*, the trial court declared and the court of appeals affirmed that the retroactive

¹ Appellant Pension Benefit Guaranty Corporation ("PBGC") incorrectly states that G & R's assessed withdrawal liability is \$208,774. (Appellant's App. E at 60a)

imposition of withdrawal liability against G & R and another employer, Shelter Framing Corporation ("Shelter Framing"), under the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 Stat. 1208 (1980), 29 U.S.C. § 1381 *et seq.*, (Supp. V 1981), was unconstitutional under the fifth amendment to the United States Constitution. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234 (C.D. Cal. 1982), *aff'd*, 705 F.2d 1502 (9th Cir. 1983). In the same decision, the court of appeals reversed the trial court ruling in the *R.A. Gray & Company* ("R.A. Gray") case. G & R will therefore be substantially affected by the Court's ultimate decision in this case.

This Court has not been fully informed in the jurisdictional statement of the piecemeal nature of this appeal, the potential for duplicating efforts of the Court and the court of appeals below, and the potential for mootness of the appeal. This brief is submitted to advise the Court of the awkward procedural posture of the appeal and to urge the Court to withhold consideration of the jurisdictional statement and the setting of oral argument until the full decision and record of the court of appeals is before the Court.

ARGUMENT

A. THE PROCEDURAL POSTURE OF THE APPEAL.

1. The G & R and Shelter Framing Proceedings

On August 28, 1981 and October 27, 1981, Shelter Framing and G & R, respectively, filed complaints in the United States District Court for the Central District of California. Both complaints challenged the constitutionality of retroactive imposition of withdrawal liability by the Carpenters Pension Trust for Southern California ("CPT"). *Shelter Framing*, 705 F.2d at 1506 (Appellants App. A at 8a). G & R was assessed a withdrawal liability in the amount of \$687,387 and Shelter Framing was assessed a withdrawal liability in the amount of \$797,648. Both employers had withdrawn from CPT prior to the September 26, 1980 enactment date of MPPAA, but before the retroactive effective date of the statute, which was April 29, 1980. 29 U.S.C. § 1461(e)(2)(A) (Supp. V 1981). The complaints in both cases challenged the imposition of withdrawal liability under MPPAA on numerous constitutional grounds. MPPAA was challenged on the grounds that the statute takes plaintiff's

property without a hearing, it denies plaintiff access to the courts, it denies plaintiff an impartial tribunal, it takes plaintiff's property without just compensation, it denies plaintiff due process through its retroactive application, all in violation of the fifth amendment, and it denies plaintiff its right to a jury trial under the seventh amendment.

The actions were consolidated for hearing and decision by the trial court. On January 14, 1982, the trial court granted a preliminary injunction enjoining CPT from any further attempts to enforce or collect the withdrawal liability assessments. The injunction also enjoined CPT from any efforts to arbitrate any dispute against the employers under the arbitration scheme of MPPAA.

On February 22, 1982, PBGC filed a motion to intervene in the actions for the purpose of urging the trial court to dismiss or stay the actions pending exhaustion of the MPPAA arbitration scheme. On March 15, 1982, the trial court denied PBGC's untimely attempt to intervene. On March 22, 23, and 24, 1982, the trial court heard the parties' motions and cross-motions for summary judgment. On April 13, 1982, the district court entered its judgments declaring that the retroactive imposition of withdrawal liability for withdrawals which occurred prior to the enactment date, but before the retroactive effective date of MPPAA, was unconstitutional under the fifth amendment. The trial court rejected the other grounds asserted in the complaints that MPPAA is unconstitutional, but it withheld ruling on the issue as to whether the imposition of withdrawal liability was a taking of property without just compensation. The district court's written decision was filed on July 9, 1983. *Shelter Framing*, 543 F.Supp. at 1234.

On March 17, 1982, PBGC filed appeals from the denial of intervention. Those appeals were docketed as Case Nos. 82-5271 and 82-5272.

On May 11, 1982, CPT filed notices of appeal from the trial court's judgments. Case Nos. 82-5460 and 82-5461. On May 24, 1982, G & R filed a notice of cross-appeal from the trial court's judgment. Case No. 82-5462.

By order dated June 16, 1982, the appeals in Case Nos. 82-5460, 82-5461, and 82-5462 were consolidated. That order allowed CPT to file an opening brief and a combined answering reply brief totaling 90 pages. *Shelter Framing* was allowed to file an answering brief totaling 50 pages. G & R was allowed to file a combined answering and opening

brief and a reply brief totaling 95 pages. (The order appears in Appendix A to this brief.)

2. The R.A. Gray Proceedings

On September 29, 1981, R.A. Gray filed its complaint in the United States District Court for the District of Oregon against the Oregon-Washington Carpenters-Employers Pension Trust Fund and PBGC. The complaint sought a declaration that the imposition of withdrawal liability in the amount of \$201,359 was unconstitutional on the grounds that the retroactive application violated the fifth amendment, it impaired contract rights, it denied equal protection, and that the MPPAA arbitration scheme denied procedural due process and a trial by jury. On August 12, 1982, the trial court entered judgment against R.A. Gray, rejecting all of the constitutional arguments advanced. *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. 531 (D. Or. 1982), *rev'd*, 705 F.2d 1502 (9th Cir. 1983) (Appellant's App. B at 30a-47a). On September 10, 1982, R.A. Gray filed its notice of appeal. Case No. 82-3506. On October 28, 1982, the court of appeals entered an order expediting the briefing schedule of the parties in order that the appeal could be heard before the same panel which would hear the appeals in the *G & R* and *Shelter Framing* cases. (The order appears in Appendix B to this brief.) The order limited all parties' briefs to 20 pages, and directed that they address only one issue: the retroactive application of MPPAA.

3. Further Proceedings and the Opinion of the Court of Appeals

On December 7, 1982, the court of appeals heard oral argument in all of the foregoing appeals. On May 20, 1983, the court of appeals entered its opinion in which it stated that the several appeals "are consolidated for disposition by this opinion." *Shelter Framing*, 705 F.2d at 1504 n.3 (Appellant's App. A at 4a n.3). The court of appeals noted that the constitutionality of the retroactive application of MPPAA was the subject of "extensive nationwide litigation." *Id.*, at 1504 & n.2 (Appellant's App. A at 3a & n.2).² The court of appeals affirmed the denial of intervention

² PBGC's appendix lists 140 litigations involving the constitutionality of MPPAA. (Appellant's App. E at 53a-75a).

to PBGC in the *G & R* and *Shelter Framing* cases, and rejected the argument that the employers were required to exhaust the MPPAA arbitration scheme prior to challenging the constitutionality of the statute. *Id.*, at 1508-09 (Appellant's App. A at 13a-15a).

The court of appeals held that retroactive application of MPPAA to the employer parties who withdrew prior to the enactment date of the statute but after its retroactive effective date was unconstitutional under the fifth amendment. *Id.*, at 1514-15 (Appellant's App. A at 27a). The court found it unnecessary to reach the other constitutional attacks on the statute which were raised by *G & R* in its cross-appeal. *Id.*, at 1515 (Appellant's App. A at 27a).

The court devoted extensive attention to the facts in the *G & R* and *Shelter* cases and a mere two paragraphs to the *Gray* facts. *Id.*, at 1505-07 (Appellant's App. A at 6a-10a). Numerous references are made to the decision of the trial court in the *G & R* and *Shelter Framing* cases in its analysis of the constitutional issue.³

On June 3, 1983, CPT filed a petition for rehearing and suggestion for rehearing *en banc*. On June 15, 1983, PBGC filed its notice of appeal in this Court under 28 U.S.C. § 1252 (1976). On or about June 27, 1983, after being granted an extension, PBGC filed its petition for rehearing and suggestion for rehearing *en banc* from that portion of the court of appeals' decision which affirmed the trial court's denial of intervention in the *G & R* and *Shelter Framing* cases.

As of this date, the court of appeals has not disposed of the petition for rehearing and suggestion for rehearing *en banc* filed by CPT in Case Nos. 82-5460, and 82-5461, nor by PBGC in Case Nos. 82-5271 and 82-5272.

B. CONSIDERATION AND EXERCISE OF JURISDICTION IN THE APPEAL SHOULD BE DEFERRED.

The appeal seeks to review the decision of the court of appeals in only one of several consolidated appeals. At the same time, the decision of the court of appeals in the *G & R* and *Shelter Framing* cases is pending on

³ Contrary to Sup.Ct.R. 15.1(j)(ii), PBGC did not include the trial court's decision in the *G & R* and *Shelter Framing* cases in its appendix.

petitions for rehearing and suggestions for rehearing *en banc*. In the interest of conserving the scarce judicial resources of this Court and due to the potential for mootness of the appeal, consideration of the jurisdictional statement should be deferred until the Court has before it all of the parties to the decision below.

Sup.Ct.R. 11.3 suggests this result. The rule extends the filing date of a notice of appeal where other parties to the decision below have filed a petition for rehearing which is pending. In those circumstances, the time for filing a notice of appeal does not begin to run until the petition for rehearing filed by other parties in the case has been resolved. The obvious intent of this rule is to avoid piecemeal appeals and to conserve judicial resources.

Other important reasons require that consideration of the jurisdictional statement in this appeal be deferred. If the Court considers the appeal at this stage, it will not have the benefit of the record in the *G & R* or *Shelter* cases. That record was relied upon heavily by the court of appeals in its decision. The Court will be denied the benefit of the views of all parties to the decision below.⁴ The *G & R* case, and only that case, raises the full spectrum of constitutional arguments attacking MPPAA.⁵

Finally, the Court must consider the potential for mootness of the appeal. If the court of appeals denies CPT's petition for rehearing and suggestion for rehearing *en banc*, CPT will petition for certiorari.⁶ On the other hand, should the petition for rehearing be granted and the subsequent decision uphold the constitutionality of MPPAA, the appeal

⁴ The *R.A. Gray* parties were limited to expedited and cursory brief presentations in the court of appeals. (Appendix B).

⁵ *G & R* will also argue that the court of appeals decision is correct on the basis that MPPAA is unconstitutional because it takes plaintiff's property without a hearing, it denies plaintiff access to the courts, it denies plaintiff an impartial tribunal, it takes plaintiff's property without just compensation, and that it denies plaintiff its right to a jury trial.

⁶ Counsel for *amicus curiae* has just received the decision of the Fourth Circuit Court of Appeals in *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, Case Nos. 83-1054, 83-1109, 83-1119 and 83-1196 (4th Cir. Sept. 9, 1983). Contrary to the Ninth Circuit, the Fourth Circuit held that retroactive imposition of MPPAA withdrawal liability is constitutional, thereby creating a conflict in the circuits. The rendition of this decision lends emphasis to CPT's stated intention to file a petition for certiorari in the event of a denial of its petition for rehearing.

would undoubtedly be moot. This waste of judicial resources can be avoided by deferring consideration of the jurisdictional statement.

In similar circumstances, the Court has deferred consideration of a petition for certiorari. *United Housing Foundation, Inc. v. Forman*, 419 U.S. 1120 (order granting certiorari), *decision on merits*, 421 U.S. 837 (1975). In that case, one party to the decision in the court of appeals petitioned for certiorari, while other parties filed a petition for rehearing from the decision of the court of appeals. After the court of appeals denied the petition for rehearing, the other parties filed a petition for certiorari to review the same decision of the court of appeals. Upon motion to defer consideration of the first petition for certiorari until the second petition was distributed to the Court, the motion was granted and the cases were considered and decided together.

CONCLUSION

The legal, economic, and social significance of issues created by MPPAA pension fund withdrawal liability are of paramount national importance. There is a swelling tide of litigation across the country and each of those cases presents potentially drastic effects upon employers, trust funds, individual employees, and labor unions.

It is imperative that review by this Court has as its foundation the fully developed records of all three cases represented in the decision under appeal. Only in the light of those full records can the contrasting conclusions of the trial courts in the *R.A. Gray* and *G & R Roofing* and *Shelter Framing* cases be adequately analyzed. The case records under the trial court decision in *G & R Roofing* and *Shelter Framing* are elements integral to the consolidated decision by the Ninth Circuit. Consideration of the *R.A. Gray* case alone will unavoidably handicap this Court in

reaching a meaningful evaluation of those factors which shaped the decision below.

Respectfully submitted,

MERRILL AND SCHULTZ

Michael E. Merrill, Esq.

Counsel for *Amicus Curiae*

APPENDIX A

FILEDUNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 16 1982

SHELTER FRAMING CORPORATION,)

Plaintiff-Appellee,)

vs.)

CARPENTERS PENSION TRUST FOR)
SOUTHERN CALIFORNIA,)

Defendant-Appellant.)

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Nos. 82-5460

82-5461

82-5462

D.C. # C-81-4457 IH

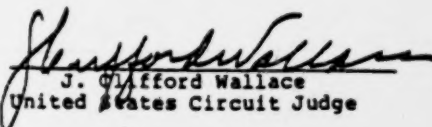
C-81-5551 IH

ORDER

A prebriefing conference in these appeals was held by telephone on June 10, 1982 by Conference Attorney Richard G. R. Schickele. The Carpenters Pension Trust for Southern California was represented by James P. Watson and Howard Kroll, Shelter Framing Corp. was represented by Cathryn M. Brogan, and G & R Roofing Co. was represented by Michael E. Merrill. Baruch Fellner participated in the conference on behalf of the Pension Benefit Guaranty Corporation. On the basis of the discussion at the conference and a review of the docketing statements the court issues the following order.

- (1) These appeals are consolidated;
- (2) the reporter's transcript has been ordered and completed;
- (3) appellant Carpenters Pension Trust shall file an opening brief of not more than 40 pages on or before August 10, 1982;
- (4) should the Pension Benefit Guaranty Corporation decide to file an amicus curiae brief, it shall do so on or before August 24, 1982 and its brief shall consist of no more than 40 pages if it discusses both the constitutional issues and the exhaustion issues and shall not exceed 25 pages if only the exhaustion issues are briefed;
- (5) appellee Shelter Framing shall file an answering brief of not more than 50 pages on or before September 27, 1982;
- (6) appellee-cross appellant G & R Roofing shall file a combined answering and opening brief of not more than 80 pages on or before September 27, 1982;

- (7) appellant Carpenters Pension Trust shall file a combined reply and answering brief of not more than 50 pages on or before October 18, 1982;
- (8) cross-appellant G & R Roofing may file a reply brief of not more than 15 pages on or before October 25, 1982;
- (9) if the parties adhere to this briefing schedule, the court shall attempt to calendar these appeals for consideration in December 1982; and
- (10) the parties may on or before November 24, 1982 file supplemental memoranda of not more than 5 pages limited to alerting the court to recently decided cases and suggesting a division of argument.


J. Clifford Wallace
United States Circuit Judge

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FILED

OCT 23 1982

APPENDIX B

THOMAS D. WILKINSON
-RECEIVED DEPT. OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R.A. GRAY AND CO.,

Plaintiff-Appellant,

vs.

OREGON-WASHINGTON CARPENTERS-
EMPLOYERS PENSION TRUST FUND AND
PENSION BENEFIT GUARANTY CORPORATION,

Defendants-Appellees.

No. 82-3506

D.C. # CV -
81-912

ORDER

DOCKETED

PAGE FILE

On October 21, 1982, a Prebriefing Conference was held by telephone before Conference Attorney Norman P. Vance. Appellant was represented by Mildred J. Carmack, appellee Trust Fund was represented by William B. Crow and David S. Paull, and appellee PBGC was represented by Baruch A. Fellner.

- (1) With the consent of the panel, this appeal shall be argued together with *Shelter Framing Corp. v. Pension Benefit Guaranty Corporation*, Nos. 82-5271 & 82-5272, and *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Nos. 82-5460, 82-5461 & 82-5462.
- (2) Argument in all six appeals will be held in Los Angeles on Tuesday, December 7, 1982, at 1:00 p.m. The panel may hereafter establish time limits for argument.
- (3) On or before November 19, 1982, the parties in this appeal may file briefs not to exceed 20 pages addressing the constitutionality of the retroactive application of the Multiemployers Pension Plan Amendments Act of 1980. Supplemental briefs addressing the remaining issues in the case may be filed after argument if so ordered by the panel.
- (4) Appellant shall file its nondesignation of reporter's transcript on or before November 5, 1982, and the parties shall file their

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respective designations of clerk's record on or before November 12, 1982. The clerk of the district court is requested to forward the record on appeal as soon as practicable.

- (5) This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/

Norman P. Vance
Conference Attorney